UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jonathan Schwab, Plaintiff, vs. Altaquip LLC, Defendant.	**Court File No. 14-cv-01731 PJS/JSM** **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Jonathan Schwab ("Schwab") worked for Defendant Altaquip, LLC ("Altaquip") at its Minneapolis service center as an Assistant Service Center Manager. On November 25, 2013, the Company terminated Schwab's employment for insubordination in breach of the Company's Code of Conduct. Before his termination, Schwab twice raised performance concerns regarding his supervisor Service Center Manager, Dave McCorkell ("McCorkell") that had resulted in delays and mis-management at the service center. Schwab now seeks to recreate history, claiming his concerns about McCorkell's performance were actually reports of common law violations, implicating a breach of contract with Altaquip's customer, Sears. However, Schwab admits he was never responsible for and has never even read this contract.

Indeed, well before Schwab raised concerns about his manager's performance, Altaquip was aware of, and actively working to improve performance at its Minneapolis facility. The facility was struggling following staff turnover and management change during its busiest season of the year. Altaquip brought in additional management to help Minneapolis improve and was closely monitoring the facility. Part of that effort was to address the performance of management personnel, including McCorkell and Schwab. To wit, McCorkell was ultimately disciplined for policy violations based on Schwab's reports. Schwab's concerns about his manager had nothing to do with his termination; he was terminated solely on the basis of his own misconduct.

Immediately following his termination and before pursing this lawsuit, Schwab filed a Charge of Discrimination with the Minneapolis Equal Employment Opportunity Commission, specifically alleging his termination was in retaliation for informing Altaquip management about "work related complaints regarding [the] job performance of an employee." What he never alleged in any fashion, however, is a complaint or concern about any protected conduct, contract breach, or illegal activity. Thereafter, Schwab brought this lawsuit claiming, for the first time, he raised concerns of illegal activity (namely a suspected contract breach) at Altaquip and his termination was in retaliation for alleged whistleblowing activity. Schwab's claim fails for the simple reasons that he never engaged in protected activity under the Minnesota Whistleblower Protection Act as he never raised any concerns to Altaquip of common law violations and he was terminated for the straightforward, valid reason of his misconduct. Moreover, Altaquip's decision to terminate Schwab's employment was caused not by his reports about his supervisor's performance but Schwab's own misconduct.

FACTUAL BACKGROUND[1]

Altaquip operates repair shops for small electric appliances and equipment sold by various retailers, including Sears and Lowe's under certain warranties. (JBS[2] 93:7-94:9.) Altaquip makes repairs and returns equipment to the retailers for ultimate return to customers. (JBS 94:16-18.) Altaquip handles transportation of equipment for some of its customers; Sears handles its own transportation of units to and from Altaquip's facility in Minneapolis. (BJR 17:10-14.)

I. ALTAQUIP'S RELATIONSHIP WITH SEARS

A. Altaquip's Contract With Sears.

Both Altaquip and Sears are service-centered businesses concerned with creating a positive experience for their customers and strive to timely return repaired equipment to their customers. (BJR 22:20-23:4.) Under Altaquip's contract with Sears, Altaquip is expected to process 85% of the units it receives within three business days of "shop time" after receiving them from Sears. (BJR Ex. 52.) The "shop time" period commences on the day the unit is received by Altaquip if received before noon, or the following day if received after noon, and ends when the repair is completed and invoiced:

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[1] This Statement is based primarily on Plaintiff's deposition testimony and exhibits. Defendant does not concede Plaintiff's version of facts is true; rather, these factual allegations are legally insufficient to establish his claims even if accepted as true for purposes of this Motion.

[2] Citations to Depositions are attached to the Affidavit of Stephanie D. Sarantopoulos, filed in support of this Motion. Citations to the Depositions are as follows: Jonathan Schwab: JBS; Ben Rebosky: BJR; Aaron Barber: ARB; Dave McCorkell: DRM; Jason Bonk: JWB; Jeanne Brauns: JMB.

> i. Shop Time Metric: 85% repairs completed in three (3) Business Days.
>
> 1. Shop time will be calculated as day one (l) for all products that are delivery receipt signed before 12:00 pm (noon) local service center repair time. All product receipts after 12:00 pm (noon) will be considered day zero (0).

(BJR 44:19-45:6; Ex. 52, Paragraph II.2.a.) If Altaquip fell below the 85% threshold, Sears could require Altaquip to reimburse its reasonable costs incurred in providing customer satisfaction or reimbursements:

> **c.** For service center-specific recovery and after mutual discussions to work through all service recovery options at the business unit management level, the party responsible for the failure to meet a Performance Metric shall pay the other party's reasonable costs required to provide service within the metrics, including without limitation, any amounts required to provide customer satisfaction reimbursement for failure to meet repair time expectations or costs of obtaining parts or transportation outside of the normal business process.

(BJR Ex. 52, Paragraph II.1c.) For units taking longer than three business days, the contract provides for discounts on Altaquip's labor costs:

> 6. Service Performance penalties
>
> a. Repair Cycle Time - the following performance penalties will apply on a unit specific basis:
>
> i. Customer and Store owned products:
>
> 1. On a specific per unit basis, if the actual shop time-for the unit is greater than fifteen (15) calendar days – Altaquip will discount repair labor price for that specific unit by 25%.
>
> 2. On a specific per unit basis, if the actual shop time for the unit is greater than thirty (30) calendar days Altaquip will discount the

repair labor price for that specific unit by 50%

(BJR Ex. 52, Paragraph II.6.) The period for repair can be extended by delays outside of Altaquip's control, such as weather, parts shortages ("waiting on parts"), the need for further information ("waiting on information"), or customer approval of a repair not covered by warranty. (BJR Ex. 52, Paragraph II.2.c, Delay Coding.)

B. Processing of Sears Units.

Sears units arrive at Altaquip's Minnesota facility *via* delivery trucks operated by Sears' employees. (JBS 143:2-4.) Before delivery, Sears tags each unit with a barcode allowing each unit to be tracked, and provides repair information. (BJR 34:12-20; JBS 148: 9-13.) Once unloaded, units are scanned, creating a bill of lading and repair sheet with customer information. (JBS 148:14-18.) Drivers sign the bill of lading, confirming delivery. (JBS 143:18-25.)

Altaquip policy directs units be scanned on arrival, so a work order can be created for billing and tracking purposes. (BJR 36:18-37:19.) Sears, itself, tracks its units delivered to Altaquip, and also had direct access to Altaquip's tracking system once the units were scanned into Altaquip's system. (BJR 35:15-22; JBS 157:16-158:21.)

After a unit is scanned, its initial status code was "waiting on technician," meaning a technician has yet to examine the unit. (BJR 129:4-9.) Once a technician diagnoses the problem, a unit may be placed into a "waiting on parts," or "waiting on customer approval" status, or is sent for repair. (JBS 156:18-23.) If the unit is placed into 'waiting' status, it will be repaired once the part is ordered, the customer approves the estimate, or whatever other delay is resolved, but the unit is no longer included in the Minneapolis shop's time metrics. (BJR 44:19-45:6, Ex. 52; ARB 133:13-17.)

II. SCHWAB'S EMPLOYMENT AT ALTAQUIP

A. Fall 2012: Schwab Begins Working as ASM/Operations Manager.

Schwab accepted an offer of employment from Altaquip, via the District Manager ("DM") Aaron Barber, on October 15, 2012, and began work at the Minneapolis Service Center as an Assistant Service Center Manager on October 19, 2012. (JBS 57:14-58:17; 62:9-13; Exs. 4-5.) Schwab understood his employment was at-will and subject to various policies, including Altaquip's Codes of Conduct. (JBS 70:18-71:17; Ex. 5-14). He further understood he was responsible for being familiar with those policies and violation of the companies' policies could result in discipline. (JBS 70:12-22.)

When Schwab began at the Minneapolis facility, he and McCorkell both worked as ASMs under the direction of SCM Irving "Chip" English ("English").[3] (JBS 112:9-21.) Schwab's role focused on operations, and he was referred to as the "Operations Manager," while McCorkell worked in the materials area as the "Materials Manager," and was responsible for handling the ordering and receiving of parts required for repairing units. (JBS 112:9-21.)

[3] When Schwab was hired, he initially met with and was provided certain documents by the then-SCM of the Minneapolis facility, Tom Poppler. During Schwab's training, Poppler left Altaquip's employment and English became the SCM of the facility. (JBS 67:21-68:12.)

B. Spring 2013: SCM English Is Discharged.

Both Schwab and McCorkell experienced difficulties working under English. For his part, Schwab raised concerns about English's management style to Barber, who resolved the situation to Schwab's satisfaction. (JBS 118:4-15.) In the spring of 2013, English engaged in a physical altercation with McCorkell. (JBS 119:13.) McCorkell reported the incident to Barber, who investigated and, as a result, terminated English's employment. (DRM 31:16-18.) Barber asked Schwab to be with English when Barber communicated the termination decision by phone. (JBS 120:7-10.) Barber also directed Schwab to provide English with the appropriate paperwork and escort him from the building. (JBS 119:21-25.)

C. May, 2013: McCorkell Is Promoted to SCM and Schwab takes on ASM/Materials Manager Role.

Following English's discharge, Schwab, McCorkell, and external candidates applied for the open SCM position. (JBS 120:23-122:2.) Altaquip's then-Director of Human Resources, Jeanne Brauns ("Brauns") interviewed candidates. (JBS 122:6-10.) McCorkell was selected as the new SCM. (JBS 124:17-19.) Altaquip elected not to hire a new ASM to replace McCorkell, however, concluding the Minneapolis facility could function effectively with an SCM and one ASM. (JBS 129:12-21; ARB, Ex. 61.) Under this structure, Schwab took over McCorkell's role as ASM/Materials Manager while McCorkell acted as both SCM and ASM/Operations Manager. (JBS 124:20-125:3.) This involved McCorkell taking responsibility for the arrival of units and Schwab trained McCorkell on this process. (DRM 68:18-69:11-14, 17.)

D. Spring - Summer 2013: Schwab and McCorkell Begin Their New Roles and the Minneapolis Facility Falters.

Schwab did not initially feel supported in his new role, because neither Schwab nor McCorkell received immediate formal training for their new responsibilities. (JBS 127:6-13.) Soon, the facility began to fall behind in their repair schedule and failed to adhere to Altaquip processes and procedures. Altaquip sent external support to train Schwab and help McCorkell efficiently run the facility. (JBS 123:13-16; 127:15-22.) Given the pace during the busy summer season, District Materials Manager, Joe Flores, suggested McCorkell and Schwab resume responsibility for their former areas until comprehensive training could be done. (JBS 127:15-22; 164:7-18.) McCorkell remained Service Center Manager, however. (DRM 78:1-4; BJR 102:2-10.)

Following this responsibility shift, senior management monitored the Minneapolis facility. District Materials Manager, Derek Viscarello, travelled to Minneapolis to address the unit backlog, review Altaquip processes, and return the facility to acceptable standards. (ARB 108:23-109:11.) Upon review, Viscarello minced no words, finding multiple breakdowns in process in Minneapolis. (DRM Ex. 46.) Likewise, Flores noted problems causing unit delays and instructed McCorkell ensure staff was following Altaquip's policies. (DRM Ex. 44.) Barber and Senior Materials Manager Don Butterworth discussed the difficulties at the Minneapolis facility, with Butterworth noting leaving units in incorrect or "fraudulent" statuses was "self-gratifying and "disrespectful" of Altaquip's customers. (ARB Ex. 73.) Butterworth also commented that it is important to keep units moving through the proper statuses, as delays and units spending long periods in delay-coded statuses "creates concern in the minds of [Altaquip's] customers." (*Id.*) Since units are closely tracked, "hiding" deficiency in one area creates a backlog in another area, and Barber instructed McCorkell to reach out for help rather than letting issues pile up. (ARB 129:6-130:21, Ex. 73.)

III. SCHWAB COMPLAINS ABOUT MCORKELL'S PERFORMANCE

A. September 2013: Schwab Complains about McCorkell's Performance, Altaquip Investigates and Disciplines McCorkell.

In September 2013, while McCorkell was in St. Louis assisting another facility, Schwab was as worried about Minneapolis' 'state of service' and raised concerns about McCorkell's performance to Barber. (JBS 167:13-25; 168: 8-15.) Schwab told Barber that: units were not being scanned properly; several units which arrived the previous Friday had not yet been scanned; and McCorkell directed the scanning delay to avoid weekend work for himself and the staff. (JBS 168:8-15; 170:16-21; 274: 3-18.) Barber told Schwab what he described was a violation of Altaquip's policies:

> He informed me that it was a -- ***a policy and procedure***. I'm not sure if this is the exact word, but it was a ***breach of our policy and procedure*** to scan the units immediately as they came off the truck.

(JBS 169:25-170:3(emphasis added.))

Barber investigated Schwab's concerns, spoke to Dock Specialist Katisha Jones ("Jones") and requested documentation from Schwab. (JBS 172:5-8; 172:9-20.) Jones confirmed that McCorkell instructed her not to scan the units. (JBS 171:11-15.) Barber travelled to St. Louis to meet with McCorkell. (ARB 141:2-3.) McCorkell admitted instructing the delay of checking-in a delivery of units, claimed he did not realize it was a "big deal," and promised it would not happen again. (DRM 81:11-82:19; 84:21-85:1; ARB 142:23-143:1.) Based on the investigation, and crediting McCorkell's forthcoming admission of his policy violation, Barber disciplined McCorkell with a written warning:

> Dave you are receiving a warning for an incident that happened on 10/11. We had SHS trucks come into the facility on 10/11. The equipment from the truck was not received into the facility. I was told that you gave the directive not to receive the product in and you confirmed that is what happened on 10/15. ***Company policy requires we check in all products and receive signatures at the time of delivery.*** Not checking in product also impacts our service metrics with our customers.

(ARB 142:18-21; JBS Ex. 24 (emphasis added.)) Barber thanked Schwab for bringing the matter to his attention and affirmed he was doing his job raising such a concern. (JBS 179:11-17.) McCorkell discussed the incident with Schwab but was unaware it was Schwab who reported the violation to Barber. (JBS 178:21-179:3.)

B. November 2013: Schwab Again Raises Concern about McCorkell's Performance in Failing to Scan In Units.

Later, in November 2013, Schwab again raised concerns McCorkell was not timely checking-in units. (JBS 180:3-19.) In this instance, upon return from vacation, Schwab believed he again saw continued failure to timely scan units. (JBS 180:20-25.) Because Schwab had not yet communicated with new DM Jason Bonk, he reached out to Barber to voice concern about McCorkell and asked Barber to speak with Bonk about the issue. (JBS 182:7-16.)

Upon learning of Schwab's concern, Bonk began an investigation, asking Schwab to gather paperwork evidencing units not being scanned properly. (JBS 183:7-15.) In response, Schwab emailed bills of lading to Bonk. (JBS 183:10-17, Ex. 25.) By comparing the bills of lading for deliveries when Schwab was on vacation with delivery route log books, Schwab contended discrepancies demonstrated units being scanned a day or more after arriving at the facility. (JWB 86:7-89:23; Ex. 25.) Part of Schwab's concern was that parts he ordered before his vacation were not processed and paired with the proper units while he was out. (JBS 185:8-186:6.)

Bonk flew (from Cincinnati) to Minneapolis to personally speak with Schwab, Jones, McCorkell and other witnesses on Thursday, November 21. (JBS 187:23-189:10.) Bonk informed McCorkell of the allegations, and McCorkell explained that delivery drivers had been off schedule, and the units had, in fact, been scanned in when they actually arrived at the facility. (JWB 56:23-57:5.) Bonk saw a need to review the documentation and investigate McCorkell's explanation, and he consulted with Brauns. (JWB 62:7-11.) They decided to suspend McCorkell and examine the evidence the following day. (JWB 62:17-63:1.) After informing McCorkell, Bonk told Schwab that McCorkell was suspended. (JBS 190:11-12.) Bonk also reassured Schwab if McCorkell were to be terminated, Altaquip would ensure the Minneapolis facility was properly supported with additional personnel to assist if necessary. (JWB 67:7-18.) From this conversation, Schwab understood McCorkell was suspended and would later be terminated, and Schwab should let McCorkell into the building to collect his things on Saturday. (JBS 190:11-12, 216:17-217:20.) Schwab also believed he was to inform the staff on Friday morning that McCorkell was suspended. (JBS 192:9-11.)

C. Friday, November 22: Rebosky and Bonk Tell Schwab McCorkell Is Reinstated with Full Privilege of his Position.

Once Bonk returned to Cincinnati, he met with Director of Operations Ben Rebosky and Brauns to discuss his investigation. (BJR 91:6-19; JMB 152:6-22.) Bonk advised he was unable to find any evidence of wrongdoing by McCorkell; when he compared the bills of lading for the deliveries Schwab alleged were late, Bonk discovered the deliveries in question aligned with delivery issues which had been contemporaneously documented by McCorkell's emails to Bonk prior to and independent of Schwab raising concern. (BJR 91:6-10; JWB 82:13-84:11.)

Having concluded McCorkell had not violated company policy, Bonk and Rebosky called McCorkell to inform him he should return to work the following morning, Saturday, November 23. (JWB 92:1-21; DRM 107:7-16.) They also told McCorkell they would inform Schwab of his return to work. (DRM 107:15-16.) Rebosky and Bonk then phoned Schwab and told him that McCorkell was reinstated with "full privilege of his position," Schwab should meet with McCorkell on Saturday morning to return McCorkell's keys, and Schwab and McCorkell needed to work as a team. (BJR 145:1-11, 20-23; JWB 95:4-20.) Schwab took from this conversation only that he was to let McCorkell into his office in the morning, work cohesively with the group, and cease his own investigation. (JBS 208:6-14.)

That evening, McCorkell sent a text message to Schwab stating he was back to work on Saturday, and asked what time the facility was going to open so he could return to work. (JBS 210:5-22; DRM 109:20-23.) Schwab advised the facility would open around 7:00 or 7:30. (DRM 109:20-23; JBS 210:3-5.) Schwab did not inquire what McCorkell meant by stating he "was back to work tomorrow [Saturday]," or contact Rebosky or Bonk to clarify the instruction to let McCorkell into the building. (JBS 210:20-211:10.) At approximately 8:00 PM Eastern time (7:00 PM Central time), however, Schwab emailed Bonk asking if McCorkell had given a time he would come to the office to retrieve his items, and whether there was "HR wise anything he needed to do." (JBS Ex. 27.) Schwab did not receive a response to this email. (JBS 218:8-17.)

D. Saturday, November 23: Schwab Interferes with McCorkell Resuming His SCM Duties.

McCorkell reported to work on Saturday morning when Schwab was already there. (JBS 219:14-23.) McCorkell first went to the office safe to retrieve his keys, but found Schwab had changed the combination. (DRM 109:23-110:10; JBS 224:19-20.) Schwab confronted McCorkell, telling McCorkell to gather his belongings and leave the facility. (JBS 220:11-13; DRM 110:4-10; BJR Ex. 77.) McCorkell replied he had been reinstated to his SCM position. (DRM 110:4-15.) Schwab asked if McCorkell had written documentation permitting him to be on company property or confirming his reinstatement, and telling McCorkell that Rebosky had told him McCorkell was not supposed to be at the facility. (JBS 221:6-24; 354:14-22.) Schwab also emailed Jason Bonk, asking "Dave is here now, says he is able to come back is this true?" (JBS 226:8-23; Ex. 28.) McCorkell called and emailed Rebosky and Bonk as well, stating "Jonathan is telling me I am suppose to take my things and leave and that I am not suppose to be here. I need immediate attention to this issue please." (DRM 115:13-17 BJR Ex. 75.)

When Rebosky called McCorkell back, McCorkell informed Rebosky that Schwab ordered him to pack his things and leave, and changed the combination to the safe and barred him from entering the shop area, standing in the doorway in an "aggressive" manner, "almost a football stance." (DRM 115:12-17; 110:11-15, 110:21-113:6.) Rebosky asked McCorkell to wait and he would call back shortly. (DRM 115:18-20.) Rebosky called back a few minutes later and asked McCorkell to have Schwab join him in the front office. (JBS 222:6-223:2; DRM 115:22-25.) Rebosky reiterated to Schwab that McCorkell was reinstated as Service Center Manager, stating "Jonathan, as stated yesterday, Dave is returning to work today with full privilege of his position." (JBS 395:4-17.) Rebosky asked Schwab if he had any questions, to which Schwab replied "No questions." (JBS 395:23-25.) Rebosky directed Schwab to leave the facility, saying they would contact him on Monday. (JBS 223:4-7; BJR 164:10-13.) Schwab gave McCorkell the combination to the safe, his key to the facility, retrieved some personal belongings, and left the facility. (JBS 224:2-15.)

E. Monday, November 25: Altaquip Investigates and Terminates Schwab's Employment.

The following Monday morning, Rebosky, Brauns and Bonk met in Cincinnati to discuss what occurred in Minneapolis over the weekend. (JWB 105:17-106:2.) Brauns and Human Resources Generalist Mary Cox phoned Schwab to hear his version of the events of the past Friday and Saturday morning. (JMB 174:9-175:11; JBS 230:1-4.) Schwab told Brauns and Cox about the Friday morning meeting and staff reaction. (JBS 230:9-24.) When Brauns asked Schwab about Saturday morning, Schwab claimed he believed McCorkell was not supposed to be at work. (JMB 180:5-25.) Brauns asked Schwab about his phone call with Rebosky and Bonk informing him McCorkell had been reinstated, but Schwab did not respond. (JMB 175:19-176:7.) Eventually Schwab admitted to receiving the call from Rebosky and Bonk relating to work, but he could not recall any detail. (JMB 176:1-4; 180:5-181:12.) Schwab did not tell Brauns, or anyone else at Altaquip that he misunderstood Rebosky's instructions on Friday afternoon, and felt no need to do so. (JBS 400:12-20.) Indeed, Schwab did not recall even telling Brauns that he believed he had been instructed escort McCorkell from the property, and admits that no one instructed him to do so. (JBS 230:1-231:14; 368:17-24.)

After talking with Schwab, Brauns met again with Rebosky and Bonk to determine next steps. (JMB 178:9-179:17.) Based on the investigation, they concluded Schwab had been insubordinate in disregarding a clear directive from Rebosky that McCorkell was reinstated, and by his behavior violated Altaquip's code of conduct warranting termination. (JMB 177:11-178:8; BJR 189:8-18.) McCorkell was not involved in these discussions. (BJR 190:4-18.) Brauns and Bonk called Schwab to inform him of the decision to terminate his employment. (JBS 231:15-22; 232:2-8.) Schwab asked the reason for his termination, and was informed he was discharged for violating the company Code of Conduct. (JBS 232:9-12.)

F. Schwab Files an EEOC Charge Claiming Retaliation for Complaining about McCorkell's Performance.

On the day of his discharge, Schwab went to the office of the Minneapolis Equal Employment Opportunity Commission to file a Charge of Discrimination. (JBS 253:15-

22; Ex. 30.) Schwab told the EEOC he complained to Altaquip management about work-related complaints of another employee's job performance, and was terminated in retaliation. (JBS 255:11-24.) On his related Intake Questionnaire Schwab claimed technicians "were out to get him" and that "that employees grouped together to falsify information to get myself fired and that it was planned." (JBS Ex. 31.) Schwab did not allege whistleblowing, that he complained of illegal or unethical activity, or even that any company policies had been violated. (JBS Ex. 31.)

On December 3, 2013, Schwab met with the EEOC regarding his Charge. (JBS 265:4-25; Ex. 32.) Schwab does not recall reporting anything about illegal activity or actual or potential breaches of contract at this meeting. (JBS 271:19-272:20.) Nowhere in his Charge or agency documentation is there any indication Schwab complained of actual or suspect illegal activity, or mentioned whistleblowing, illegal activities, or violations of company policy. (JBS 272:2-20; Ex. 32.)

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A. Summary Judgment Standard

The court "shall grant summary judgment" if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party opposing summary judgment must set forth specific admissible facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Adams v. West Publ'g Co.*, 25 F.3d 635, 636 (8th Cir. 1996.) A Plaintiff may not rest on mere allegations or denials, but must demonstrate the existence of specific facts creating a genuine issue for trial. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). If he fails to establish a genuine material fact issue regarding a single element of a claim, summary judgment is appropriate. *See Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 735-36 (8th Cir. 2000).

B. The Minnesota Whistleblower Act Standard

The Minnesota Whistleblower Act ("MWA") prohibits retaliation by an "employer," defined as an entity with "one or more employees in Minnesota." Minn. Stat. § 181.931, subd. 3, .932, subd. 1.

Where, like here, direct evidence of retaliation is lacking, employment-related retaliation claims under Minnesota law are analyzed under the *McDonnell-Douglas* burden shifting framework. *See, e.g.*, *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. Ct. App. 2001); *Boettcher v. Express Services, Inc.*, 2014 U.S. Dist. LEXIS 87722, *8-9 (D. Minn. June 27, 2014) (MWA); *Carlson v. Arrowhead Concrete Works, Inc.*, 375 F. Supp. 2d 835, 841 (D. Minn. 2005) (MNOSHA retaliation); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn.1983) (MHRA retaliation). To establish an MWA *prima facie,* Schwab must prove: (1) protected activity; (2) an adverse employment action; and (3) a causal connection between the two. *Cokley*, 623 N.W.2d at 630. If met, the burden of production shifts to Altaquip to articulate a legitimate, non-retaliatory reason for his dismissal. *Id.* Schwab must then prove Altaquip's stated reasons are not true and are pretext for retaliation. *Id.*

II. SCHWAB CANNOT ESTABLISH A *PRIMA FACIE* CLAIM OF RETALIATION

Schwab's MWA claim fails because he did not engage in any protected activity under the MWA, and he cannot establish a causal connection between his termination and any conduct he alleges is protected under the MWA.

A. Schwab Did Not Engage in Protected Activity under the MWA.

1. Schwab's concerns about McCorkell's performance and adherence to Altaquip policies and procedures was not protected conduct.

The MWA prohibits an employer from discharging an employee "because" the employee "in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932 subd. 1(1). Here, Schwab never made a report of any actual, suspected, or planned violation of any state, federal or common law, or of any rule adopted pursuant to law.

Schwab alleges Altaquip retaliated against him because he reported "what he reasonably and in good faith believed to be violations of common law." (Compl. ¶¶ 21-23.) Schwab claims he reported violations of common law when he reported McCorkell's failure to timely scan units which breached Altaquip's contract with Sears. (Compl. ¶ 13.)[4] When testifying about what specific violations of common law he reported, however, Schwab identified only concern for Altaquip's "policies and

[4] Notably, although Schwab's complaint alleges he "believed Defendant breached the contract and committed fraud based on a contractual relationship it had with Sears," Schwab never complained to management, or anyone else, about any perceived "fraud." Schwab's testimony confirms his complaints to management involved only McCorkell's late-scanning of units arriving from Sears's trucks.

procedures" which he believed were violated by McCorkell. (JBS 316:21-317:2.) Although he alleges raising concern for violation of Altaquip's policy was equivalent to raising violation of the contract with Sears, such a theory is belied by Schwab's own admissions that:

- he was never aware of what Altaquip's contract with Sears actually required; (JBS 317:15-21);
- he never personally reviewed Altaquip's contract with Sears; (JBS 96:4-20); and
- he was not responsible for any of the terms of Altaquip's contract with Sears (JBS 97:21-98:10).

By his own testimony and admitted ignorance as to the terms of Altaquip's contract with Sears, Schwab's complaints about McCorkell's performance could only relate to internal Altaquip policies and procedures. (JBS 181:19-22.) Indeed, when pressed for detail about what he communicated when raising those concerns, Schwab consistently admitted that he was unable to recall the use of the words "contract" or "breach" in his first complaint that would lead Altaquip to understand his concern was anything other than for internal policies and procedures:

> **Q.** Tell me exactly what you told Mr. Barber about the contract issue.
> **A.** I don't recall my every word exactly, but it was in that area.
> **Q.** Did you use the word "breach" with Mr. Barber when you called him in September of 2013?
> **A.** I don't recall.
> **Q.** Did you use the word "contract" when you called Mr. Barber in September of 2013 when you discussed with him units not being scanned in correctly the previous week?
> **A.** No. Pardon me. I don't recall.

(JBS 169:10-21.) Or in raising his second complaint:

> **Q.** In your conversation with Mr. Barber did you tell him that you had a concern that the contracts or agreements with Sears were being breached or not followed?
> **A.** I don't recall using that word.
> **Q.** And how about in your conversation with Mr. Bonk when he called you?
> **A.** The same. I do not recall using that word in that conversation.

(JBS 184:4-12.) Schwab similarly backpedaled when testifying about how management stressed the contract's terms. Schwab testified that management stressed the three-day cycle weekly, if not daily, but equivocated, admitting "the exact words, I do not recall." (JBS 100:15-103:23.) Schwab's contention that Altaquip management was focused on Altaquip's contract with Sears is further belied by the fact that McCorkell was disciplined not for breaching or otherwise impacting Altaquip's contract with Sears, but rather, for violating company policy. (JBS Ex. 24.)

Schwab even backed down on the very basis for his belief that a failure to meet the three-day cycle would result in a violation of the contract.

> **Q.** What did Aaron Barber say to you about the failure to abide by a three-day expectation and a breach of contract? You keep telling me that there's – the word "contract" was used. What I want to know is exactly what he told you that led you to believe that a failure to complete a three-day turn-around resulted in a breach of the contract.
> **A.** I don't recall the exact words, but the emphasis was based on our completion rate and how we were functioning as a location, and in correlation to the contract with Sears, if we were complying with it or failing or succeeding with that contract.

* * *

> **A.** I don't recall the exact words, but involved that we needed to repair our state of service because it was below the percentile that we needed to comply with.
> **Q.** All right. And what else did he say?
> **A.** I don't recall.
> **Q.** Did he say that you were in breach of a contract? Did he use those words, yes or no?
> **A.** Those exact words, I don't recall.

(JBS 105:15-107:25.)

Schwab's EEOC Charge further evidences that he did not believe illegal conduct was occurring. Schwab's Charge, submitted the day of his discharge, makes no mention of any illegal or unethical conduct, or of violations of Altaquip policy. Rather, he claims he was terminated in retaliation for informing management of **"work-related complaints of job performance of an employee"** (JBS Ex. 30) and the staff of the Minneapolis facility "gang[ed] up on him for complaining to upper management." (JBS Ex. 32.) Under penalty of perjury, Schwab stated he made "complaints of job performance," not actual or suspected illegal conduct. (JBS Ex. 30.) Furthermore, Schwab did not suggest it was Altaquip management, or even McCorkell taking action against him; rather, that ***staff*** was against him. Schwab did not even mention the Sears contract to the EEOC, let alone suggest he had complained about its potential breach. It was only after his charge was dismissed that Schwab, months later, changed his story to raise, for the first time, his purported whistleblower claims.

2. Schwab's complaints about McCorkell's performance did not implicate an actual contractual violation.

To be protected under the MWA, an employee's report "must implicate an actual … law and not one that does not exist." *Kratzer v. Welsh Co., LLC*, 771 N.W.2d 14, 23

(Minn. 2009). That is to say, assuming the facts of the situation are as the employee reported them, those facts "constitute a violation of law or rule adopted pursuant to law." *Id*. a 22. Here, Schwab's own version of the concerns he raised at Altaquip do not implicate any violation of state, federal or common law. Schwab's claims McCorkell delaying the scanning of units arriving at the Minneapolis facility violated the three-day turn-around obligation contained in Altaquip's contract with Sears. (JBS 318:3-6.) Despite his contention, however, this misconduct did not constitute a breach.

Altaquip's contract with Sears sets certain service metrics, including that 85% of units delivered should be completed within three business days. (BJR Ex. 52.) Altaquip's failure to meet this metric was a potential explicitly anticipated in the contract's terms. The contract's failure and cure provisions would only be implicated if more than 15% of the total units delivered to Altaquip by Sears required more than three days of service time. (*Id.*) Schwab had no reason to believe, and never alleged this was the case. Even if it were true that McCorkell's performance caused every unit delivered to the Minneapolis facility to require more than three days of shop time, it is impossible to know whether Altaquip would have fallen below the 85% metric simply due to McCorkell's policy violation.

3. Schwab's Concerns About McCorkell Were Not Raised in Good Faith

To constitute protected activity under the MWA, a "report" must be made in "good faith." Minn. Stat. § 181.932, subd. 1(1), (4). "Whether a report was made in good faith is a question of fact, but courts may decide as a matter of law that certain conduct does not constitute a report." *Freeman v. Ace Tel. Ass'n*, 404 F.Supp.2d 1127, 1139 (D. Minn. 2005). The MWA was amended in 2013 to provided additional guidance for courts in interpreting "good faith" under the MWA. These clarifications, as stated in the legislative testimony, are not substantive changes to the law and did not change or overrule any case law interpretation of "good faith."[5] *Hearing on S.F. 443 Before the S. Comm. on Judiciary*, 2013 Leg., 88th Sess. (Mar. 21, 2013) (statements of Sen. Goodwin and Larry Schaefer), *available at* http://www.senate.leg.state.mn.us/schedule/unofficial_action.php?ls=88&bill_type=SF&bill_number=0443&ss_number=0&ss_year=2013 ("definitional clarifications . . . are just that – they're clarifications"). Clarifications do not overturn case law, they simply add guidance to the well-established requirement that in determining "good faith," "[t]he central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose illegality." *Sledge v. ConAgra Foods, Inc.*, 2014 U.S. Dist. LEXIS 77842 (D. Minn. June 9, 2014); *Braylock v. Jesson*, 819 N.W. 2d 585, 588-91, (Minn. 2012); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

For a report to be made in good faith, the Court must look "not only at the content of the report, but also at the reporter's purpose in making the report." *Obst*, 613 N.W.2d at 202. "The central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose illegality." *Id.* Importantly, the Court should consider "the reporter's purpose at the time the reports were made, not after subsequent

[5] Courts have recognized the amendments substantively changed certain aspects of the MWA, but no court has held the "good faith" definitional clarification substantively changed courts' consistent interpretation of "good faith." *See, e.g.*, *Sledge v. ConAgra Foods, Inc.*, 2014 U.S. Dist. LEXIS 77842 (D. Minn. June 9, 2014); *White v. Allina Health Sys.*, No. 62-CV-13-4745 (Minn. Dist. Ct. May 15, 2014) (attached as Ex. G).

events have transpired." *Id.* (*citing Wolcott v. Champion Intern. Corp.*, 691 F. Supp. 1052, 1059 (W.D. Mich. 1987), for the proposition when the purpose of the employee at the time he makes a report is motivated by self-interest and not out of a desire to protect the public, the report was not made in good faith.) The purpose of this analysis is to "ensure that the report that is claimed to constitute whistle-blowing was in fact a report made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim." *Id.*

Schwab's report regarding McCorkell's performance related to scanning units was not made to expose an illegality. Rather, Schwab reported McCorkell's noncompliance with Altaquip's internal policies because he was concerned about how those metrics would impact his own employment. In an email to Jason Bonk, where Schwab details his concerns about McCorkell's conduct he does not communicate any concern about legal compliance or contract terms and instead, is concerned about how his own numbers looked upon his return from vacation:

> **Q.** Anywhere in here do you raise any concerns about an agreement or contract with Sears or any other customer of Altaquip's?
> **A.** I did not in this email. When I wrote this email after speaking with Jason and knew the underlying concerns that went along with this email.
> **Q.** The underlying concerns being the departure from policy and procedure?
> **A.** Yes.

(JBS 187:11-19.)

> **Q:** . . . Were you concerned at this time that your numbers were looking bad and that you were going to be perceived as not having done the job you needed to do?

> **A.** My numbers faulted -- the days I went on vacation, the 7th through the 12th, zero of my job functions were completed, so this caused a major backup of all parts that were to be ordered for parts that came into the building. When I returned from vacation for four days parts were not received.

(JBS 185:8-186:8) "Reporting conduct for purposes other than exposing an illegality ... is not sufficient to satisfy the good faith requirement." *Chial v. Sprint/United Management Co.*, 569 F.3d 850, 855 (8th Cir. 2009) (holding a report of an allegedly unethical commission practice was not made in good faith when the report was not made because the plaintiff believed the practice was illegal and such a belief was not expressed until after the report was made). Indeed, the purpose of Schwab's report could have nothing to do with Altaquip's contract with Sears, as Schwab admits he had no knowledge of the contract's provisions at the time of his report.

> **Q.** Did anyone at Altaquip ever review pages of a contract between Altaquip and Sears with you?
> **A.** No.
> **Q.** Did you ever ask to see the contract between Sears and Altaquip thereafter?
>
> * * *
>
> **A.** No.
> **Q.** Did you ever try to find the contracts yourself?
> **A.** No.
> **Q.** Do you know where the contracts were kept?
> **A.** No.
> **Q.** Do you know where the contracts were stored?
> **A.** No.

(JBS 96:4-20.) It is for that reason Schwab did not even mention the contract or any potential breach when reporting his concerns to Barber:

> **Q.** What did you tell Mr. Barber specifically?
> **A.** I let Mr. Barber know the policies and procedures that were not being followed within the building.

> **Q.** Did you tell him exactly what policies and procedures were not being followed?
> **A.** The ones I recall are the -- there was three: Again, was the not scanning of units immediately off the truck. The second was our policy of when a part arrives to our location, we are to receive it immediately and match it to the specific unit that requires that part. And the policy and procedure which relates to FIFO, the first-in and first-out.

(JBS 181:19-182:6)

Schwab's lack of good faith is further demonstrated by the timing of his report. Schwab testified McCorkell stated he instructed staff members to delay scanning in units because McCorkell wanted to spend time with his family before leaving for St. Louis. (JBS 274:3-15.) Nevertheless, when he returned to work the following Monday, Schwab feigned ignorance, asking Jones if there had been a weather delay, or some other factor causing her not to scan the units. (JBS 171:5-15.) If his concerns were truly Altaquip's compliance with its contract with Sears, or indeed adherence with Altaquip's policies, there was no reason for Schwab to wait until the following Monday to raise concern, or to inquire disbelievingly of Jones why units were not checked in; he knew the reason based on his conversation with McCorkell the previous Friday.

As a matter of policy, to extend protection under the MWA any time an employee complains about internal policies which ***might*** impact a contract between his employer and a third party would dramatically create an unreasonably broad class of potential MWA litigants. Such an interpretation would place an unreasonable burden on employers to review every employee complaint about a policy concern against any and every contractual obligation which the policy might somehow relate. This goes well beyond the Minnesota legislature's stated purpose in amending the MWA, to simply clarify the statute's language.

When making these amendments, the legislature was particularly wary of expanding too broadly the scope of employees who might file suit because they were disgruntled with their treatment by employers. *Hearing on S.F. 443 Before the S. Comm. on Judiciary*, 2013 Leg., 88th Sess. (Mar. 21, 2013) (statements of Sen. Sheran and Sen. Latz). To interpret these amendments to extend protection to complaints about internal policies which might in some manner implicate contractual obligations of an employer would create the precise danger anticipated by the legislature where reporting "paralyzes an employer from moving forward." *Id.* It is for this reason a plaintiff must have actual knowledge of the contract and specifically identify violations of a contract when making a complaint to fall within the protection of the statute.

4. Schwab had no whistle to blow – McCorkell's performance shortfalls and Minneapolis' backlog of units was widely known and being addressed.

What's more, Schwab's reports to Altaquip about McCorkell's performance failure to timely scan units did not inform Altaquip of anything it did not already know. Altaquip and Sears both had sophisticated, electronic tracking systems to track units through the repair cycle from departure from and arrival back to Sears. (ARB 46:3-19; BJR 21:9-11; 28:18-32:8; JBS 157:13-158:21.) When a purported whistleblower informs his employer only of what is already known, there "is no whistle to blow." *Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006). Altaquip management was well aware of the delay in unit repair in Minneapolis and was actively working with McCorkell and others to improve Minnesota's performance. (ARB 108:23-110:19.) McCorkell was coached about timely receiving units and processing parts. (DRM 151:8-20.) McCorkell was disciplined for violating policy, based on Schwab's report. (JBS Ex. 24.) Altaquip District Managers and District Materials Managers raised concerns about McCorkell's performance to upper management. (BJR 182:9-13.) Schwab's allegation that the backlog was caused by McCorkell's intentional instruction to delay scanning of units required specific investigation, but that the facility was behind and units were not being timely processed was of no surprise to Altaquip. (ARB 140:25-141:25.) There was no alleged conduct, illegal or otherwise, about which Altaquip was unaware prior to Schwab's report. There was "no whistle to blow," and Schwab's report is not protected under the MWA. *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 332 (Minn. 2011); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000); *Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006).

B. There Is No Causal Connection between Schwab's Allegedly Protected Activity and His Termination.

Schwab also cannot establish a *prima facie* case under the MWA because he fails to establish his alleged "protected activity" was causally connected to his termination. Schwab offers no evidence his employment was terminated because of his reports. *Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F. Supp. 2d 975, 991 (D. Minn. 2011); *Hubbard*, 330 N.W.2d at 444 (Minn. 1983). Altaquip terminated Schwab's employment for his insubordination in violation of its code of conduct. (JWB 115:16-21; BJR 144:4-12.) Schwab does not deny the misconduct resulting in his discharge. When McCorkell reported to work on November 23, Schwab told McCorkell to gather his belongings and leave, and demanded documentation from McCorkell evidencing reinstatement.

Only after Altaquip investigated and reviewed Schwab's behavior ***after*** Schwab's second report (of identical concern) that decision to discipline, let alone discharge Schwab, was taken. As Schwab himself admits, he was not disciplined, or given any indication disciplinary action would be forthcoming when he spoke with Rebosky on Friday afternoon. (JBS 391:16-392:6.) The conclusion that Schwab's intervening misconduct was the cause of his discharge is buttressed by the fact that, far from receiving any discipline for his first report of McCorkell's misconduct, Schwab was specifically thanked by management. (JBS 179:11-17.)

C. Schwab Cannot Demonstrate Pretext.

Schwab's MWA claim also fails because he cannot establish Altaquip's legitimate, non-retaliatory reason for his termination are pretext for retaliation. "In determining whether a plaintiff has produced sufficient evidence of pretext, the key question is not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred." *Miller*, 812 F. Supp. 2d at 991-92. "[W]hen an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not [the court's] province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *Id.* at 992; *see also McKay v. U.S. Dep't of Transp.*, 340 F.3d 695, 700 (8th Cir. 2003). "'[A]n employee's attempt to prove pretext requires more substantial evidence than it takes to make a *prima facie* case because . . . evidence of pretext and retaliation is viewed in light of the employer's justification.'" *Miller*, 812 F. Supp. 2d at 992. Schwab must demonstrate the evidence considered in its entirety: (1) creates a fact issue as to whether the employer's proffered reasons are pretextual; and (2) creates a reasonable inference a [prohibited motive] was a determinative factor in the adverse employment decision. *Cronquist v. City of Minneapolis*, 237 F.3d 920, 926 (8th Cir. 2001).

The only way in which Schwab suggests Altaquip's reason for terminating his employment is pretext is the *temporal proximity* of the second occasion on which he reported McCorkell and Altaquip's decision to discharge him. (JBS 322:25-323:7.) Temporal proximity, by itself, cannot show retaliatory motive or overcome an employer's proffered legitimate, non-discriminatory rationale. *Skalsky v. Indep. School Dist. No. 743*, 772 F.3d 1126, 1131 (8th Cir. 2014); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir.1999) (en banc) ("Generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation."). Furthermore, "[a] plaintiff's prima facie retaliation case, built on temporal proximity, is undermined where the allegedly retaliatory motive coincides temporally with the non-retaliatory motive." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 1001 (8th Cir.2011).

When Schwab first reported his concerns about McCorkell in early October 2013, Altaquip immediately investigated, and Barber specifically thanked him. (JBS 179:11-17.) As a result, McCorkell was disciplined, and Schwab did not experience any change in the terms and conditions of his employment. (JBS 253:7-11, 323:8-327:1.) Altaquip similarly took Schwab's second report in November seriously, dispatching Bonk to investigate the situation. (JBS 187:23-188:6; JWB 54:10-55:5.) Schwab acknowledges Bonk was prepared to terminate McCorkell if Schwab's allegations were borne out. (JBS 190:11-12.) Altaquip only decided to discipline Schwab after investigating the events of November 23 when ***Schwab's*** failed to abide by his manager's clear directives. *Cf. Boettcher*, 2014 U.S. Dist. LEXIS 87722, at *11 (summary judgment where employer terminated employee who reported alleged threat by co-worker based on results of company's investigation, concluding reporting-employee had engaged in misconduct) (*citing McCullough v. Univ. of Ark. for Med. Sciences*, 559 F.3d 855 (8th Cir. 2009)); *Hill v. Harsco Corp.*, 356 F.3d 920 (8th Cir. 2004) (plaintiff's altercation with other employee provided basis, after investigation, for termination)).

1. Schwab Fails to Identify Any Evidence of Pretext.

Schwab's claim also fails because he cannot identify any evidence creating an inference Altaquip terminated his employment because he made a "report." Schwab is unable to show Altaquip's stated reasons are "unworthy of credence . . . because [they] ha[ve] no basis in fact" or "that a [prohibited] reason more likely motivated" Altaquip. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1047 (8th Cir. 2011). Schwab must present some evidence, such as he "received a favorable review shortly before [the adverse action], that similarly situated employees . . . were treated more leniently, the employer changed its explanation for [its conduct], or the employer deviated from its policies." *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 925 (8th Cir. 2014).

Schwab has not suggested Altaquip's assessment of his performance changed due to his complaints about McCorkell. Nor is there any evidence that Altaquip deviated from its policies in investigating Schwab's complaints or misconduct. In both instances of Schwab's reported concerns, Altaquip dispatched a District Manager to investigate. (JBS 179:11-17; 253:7-11, 323:8-327:1; 187:23-188:6; JWB 54:10-55:5.) Schwab has produced nothing to suggest Altaquip treated similarly situated employees more favorably. Schwab himself is his best comparator; Altaquip specifically thanked him for raising his concerns in October. (JBS 179:11-17.) This undercuts Schwab's argument that Altaquip terminated Schwab's employment because of his concerns rather than the real reason – his insubordination violating Altaquip's Code of Conduct.

Moreover, Schwab cannot identify any comment or action by any decision-maker that establishes an inference of discrimination. There is no record evidence to suggest Rebosky, Barber, Bonk or Brauns made any comments suggesting retaliatory intent. No one suggested that Schwab should "learn when to shut [his] mouth" or that his complaints indicated some kind of lack of commitment to his job. *Cf. Chavez-Lavagnino v. Motivation Educ.Training, Inc.*, 767 F.3d 744, 750 (8th Cir. 2014); *Weber v. Minn. Sch. Of Bus.*, 2014 Minn. App. Unpub. LEXIS 1295 (Minn. Ct. App. Dec. 15, 2014).

The only individual Schwab suggests may have reason to retaliate against him, McCorkell, was not involved in the decision to terminate his employment. (BJR 190:4-18.) Notably, of the three Altaquip employees who participated in the decision to discharge Schwab's employment, only Rebosky had any familiarity with the contract, and he was unfamiliar with specific timeline requirements of the contract. (BJR 12:19-12, 38:18-41:11; JMB 11:11-13:18; JWB 15:3-11.) It would be impossible for these decision-makers to retaliate against Schwab based on information about which they were ignorant.

2. The Timing of Schwab's Discharge does not Establish Pretext.

Just as temporal proximity does not establish a causal connection between Schwab's complaint and his discharge, it does not create an inference of dishonesty or retaliation where, like here, Schwab has no evidence suggesting pretext. "[T]o allow [plaintiffs] to establish pretext solely on the basis of the short interval between the incident and [] termination would discourage employers . . . from reacting promptly to difficult workplace incidents. The Minnesota Whistleblower Act was 'not intended to be used by employees to shield themselves from the consequences of their own misconduct or failures.'" *Boettcher*, 2014 U.S. Dist. LEXIS 87722, at *12, n. 5 (quoting *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127, 1140 (D. Minn. 2005)). Schwab violated Altaquip's Code of Conduct and cannot offer any evidence to establish a pretext for hiding a retaliatory motive.

1. Altaquip Conducted a Thorough and Fair Investigation and Concluded Schwab was Insubordinate.

Altaquip's investigation also undercuts Schwab's retaliation claims. When evaluating evidence of an employer's reasons for terminating an employee, courts do not sit as "super personnel departments" and should not substitute their own judgment for those made by employers, except to the extent those judgments involve intentional unlawful conduct. *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 957 (8th Cir. 2001); *see also McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995)

("Employers have wide latitude to make business decisions"). Employers are not required to conduct perfect investigations. *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005 (8th Cir. 2012) ("the appropriate scope of an internal investigation . . . is a business judgment, and [the Court does] not review the rationale behind such a decision."); *Cf. Miller v. Stifel, Nicolaus & Co., Inc.*, 812 F. Supp. 2d 975, 991-92 (D. Minn. 2011) ("when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination.").

Schwab has presented no evidence Altaquip's investigation into his conduct was predetermined to conclude with his discharge. During the investigation, Altaquip spoke with Schwab to obtain his version of events. (JMB 174:9-175:11; JBS 230:1-4.) When asked why he did not comply with Rebosky's instruction that McCorkell was reinstated, Schwab did not provide any explanation. (JMB 176:1-4; 180:5-181:12.) Indeed, Schwab testified that he did not believe he needed to explain himself to his supervisors. (JBS 400:16-20.)

CONCLUSION

Schwab fails to establish a genuine issue of material fact relating to his whistleblower claim under Minnesota law. Altaquip terminated Schwab's employment solely because of his intervening misconduct. Schwab was entirely unfamiliar with Altaquip's contract with Sears, about which he now claims he complained were violated at common law. The very nature of Schwab's complaint implicated Altaquip policies and standard operating procedures – not contract terms or legal violations. Moreover, Schwab did not make a good faith report of a violation or suspected violation of federal, state, or common law, or rule adopted pursuant to law. Schwab was concerned for his own employment, avoiding culpability for and placing blame on McCorkell for the Minneapolis facility's mismanagement – and nothing more. Accordingly, Altaquip's Motion for Summary Judgment should be granted in its entirety.

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